Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-6623

CARL ALBERT COLLINS.....PETITIONER

v.

STATE OF ARKANSAS.....RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

Petitioner, Carl Albert Collins [hereafter Collins], a prisoner under sentence of death, petitions for a writ of certiorari to review the denial of post-conviction relief by the Supreme Court of Arkansas.

QUESTIONS PRESENTED

1. Whether petitioner was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel at the guilt phase, and the penalty phase, of his capital murder trial.

2. Whether the failure of the Supreme Court of Arkansas to permit an evidentiary hearing to fully devel- of petitioner's claim of ineffective assistance of counsel denied him meaningful review of the sentence as guaranteed by the Due Process Clause of the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas denying Collins permission to proceed under Rule 37, A.R.Crim.P. (Repl. 1977), is reported at Collins v. State, ___Ark.___, 611 S.W.2d 182 (February 2, 1981). A copy of the original opinion is attached as an exhibit herewith.

JURISDICTION

The opinion of the Supreme Court of Arkansas denying Collins permission to proceed under Rule 37, A.R.Crim.P. (Repl. 1977), was rendered on February 2, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), with Collins asserting here and having asserted below, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury...and to have the assistance of counsel for his defense.

Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, or excessive fine imposed, nor cruel and unusual punishments inflicted.

Fourteeneth Amendment, United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

Arkansas Rules of Criminal Procedure:

> Rule 37.1 Scope of Remedy
>
> A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a

new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

(b) that the court imposing the sentence was without jurisdiction to do so; or

(c) that the sentence was in excess of the maximum authorized by law; or

(d) that the sentence is otherwise subject to collateral attack; may file a verified motion at any time in the court which imposed the sentence, praying that the sentence be vacated or corrected.

Rule 37.2 Commencement of Proceedings: Pleadings: Permission of Supreme Court Following Appeal.

(a) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall be entertained by the circuit court without prior permission of the Supreme Court.

(b) All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for subsequent petition.

STATEMENT OF THE CASE

Collins was convicted of capital felony murder on December 4, 1974, pursuant to an information charging that he had killed a man, injured his wife, and stolen a truck and some money. The State alleged that this was murder during the course of a robbery under Act 438 of 1975. After trial by jury, Collins was sentenced to death by electrocution. His conviction and sentence

were affirmed by the Supreme Court of Arkansas. Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), judgment vacated, Collins v. Arkansas, 429 U.S. 966 (1976), aff'd, Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), cert. denied, 434 U.S. 878 (1977), rehearing denied, 434 U.S. 977 (1977).

Collins was without counsel after this point. Present counsel was later obtained to begin post-conviction remedies available to Collins. After having first been denied by the Supreme Court of Arkansas, Collins was able to obtain a copy of the transcript of his voir dire examination. This was provided in October, 1980, and a Petition for Permission to Proceed Pursuant to Rule 37, A.R.Crim.P. (Repl. 1977), was filed in December 19, 1980. Under Rule 37, Collins sought an evidentiary hearing to develop the issues raised from a review of the record in his case.

Unless granted permission to proceed to the trial court for an evidentiary hearing, state post-conviction remedies are ended with a denial of a petition for permission to proceed. Collins request was denied and it is from that denial that this petition is being filed. Collins v. State, ___Ark.___, 611 S.W.2d 182 (February 2, 1981).

In his petition to the Supreme Court of Arkansas, Collins assigned as error the following grounds that were not raised during direct appeal because they dealt with whether he had received effective assistance of counsel:

(a) The use of a law enforcement officer/witness as a bailiff or security guard during the course of the trial, and the failure of counsel to object to this procedure;

(b) The action of the trial court in excusing for cause certain jurors without having first let Collins voir dire them to determine if there was a cause basis, and the failure of counsel to object to this procedure;

(c) The action of the trial court in not holding an individual, sequestered voir dire in death-qualifying the jury, and the failure of trial counsel to object to this procedure;

(d) The failure of the trial court to instruct the jury on all lesser included offenses, including that of murder in the first degree, and the failure of trial counsel to object to this procedure;

(e) The failure of trial counsel to attempt to rehabilitate a juror excluded because of opposition to the death penalty;

(f) The failure of trial counsel to put on any evidence in mitigation of the death penalty or to determine that such evidence was available;

(g) The failure of trial counsel to object to the instructions during the penalty phase of the trial that were contrary to Arkansas law, and that placed the burden of proof on Collins as to mitigation outweighing aggravating circumstances and the death penalty.

In denying the petition the Supreme Court of Arkansas stated that nothing in the record indicated that the above constituted error, or that the failings of trial counsel were legitimate tactics and not ineffectiveness.

Since the Supreme Court of Arkansas stated that the factual questions raised were mere conclusion, and denied Collins a hearing in order to develop fully the factual bases presented, Collins was denied meaningful review of his claim for post-conviction relief. From this denial, this petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE AND PENALTY PHASE OF HIS CAPITAL MURDER TRIAL.

This Court decided the case of Presnell v. Georgia, 439 U.S. 14 (1978). In vacating the judgment there on procedural grounds, the Court declared that:

> ...fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349.

Collins contends that this principle should also apply in reviewing a death penalty to determine if a defendant has received effective assistance of counsel at either the guilt, or the penalty, phase of a capital trial.

This Court has long held that the Sixth Amendment, through the Due Process Clause of the Fourteenth Amendment, guarantees a defendant of effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). If a defendant is not granted effective assistance of counsel because counsel did not appreciate, or failed to make proper objections, to improper material or evidence being presented to the jury, then a death penalty rendered under such conditions should not stand.

In this case, Collins was denied such assistance of counsel. Relying solely upon the record of the proceedings in this matter, and not going outside the record, Collins pointed out to the Supreme Court of Arkansas numerous areas where counsel failed to object, failed to investigate, or permitted improper activity to occur during the trial. These will be discussed below:

(a) During the trial Sergeant Quimby Johnson, an investigator with the Arkansas State Police, testified as a material witness against Collins. After his testimony that he was the first person on the scene of the crime and that he found information to suggest that a robbery had been committed, Johnson was used as a security person or bailiff for the remainder of the trial. As pointed out in Turner v. Louisiana, 379 U.S. 466 (1965), this type of activity can so subtley act as a voucher by the trial court for the integrity of such a witness, that it denies a defendant due process as guaranteed by the Fourteenth Amendment.

Despite such holdings by this Court, counsel for Collins offered no objection to this procedure. This was ineffectiveness.

(b) During the voir dire, the trial court excused certain jurors for cause without giving Collins the opportunity to voir dire those jurors. Specifically, two of these jurors were students at the University of Arkansas at Fayetteville--i.e., the situs of the trial. Their being excused for cause did not fall within one of the statutory bases provided in Ark.Stat.Ann. § 39-108(Supp. 1978). Trial counsel did not object to this procedure and was therefore ineffective.

The trial court excused another student because of a pending test, yet did not check, nor did counsel seek to check, if the test could be postponed until after the trial. Again, counsel was ineffective at this point in jury selection.

Finally, a juror was excused for cause because of an alleged hardship on his business if he served on the jury. Yet, this same juror had stated that he could serve on the jury if necessary. Again, counsel did not object nor voir dire the juror on that point. [R. 364]

(c) The trial court conducted the voir dire of the jury in open court without sequestering all potential jurors except the one being questioned. The jury was qualified to render a death penalty in accordance with Witherspoon v. Illinois, 391 U.S. 510 (1968). As noted by this Court, it is important that counsel be permitted to determine the full implication of the answers of veniremen concerning the death penalty, and only if it is unmistakably clear that the veniremen is opposed to the death penalty and unwilling to consider its imposition under any circumstances, should such a juror be excused.

The Supreme Court of California has held that the sensitive nature of such questioning requires individual, sequestered voir dire. Hovey v. Supreme Court of Alameda County, ___Cal.3d___, ___P.2d___, 168 Cal. Rptr. 128 (August 28, 1980):

> Because jurors would then witness only a single death-qualifying voir dire--their own--each individual juror would be exposed to considerably less discussion and questioning about the various aspects of the penalty phase before hearing any evidence of guilt. Such a reduction in the pretrial emphasis on penalty should minmize the tendency of a death-qualified jury to presume guilt

> and expect conviction. Hovey v. Superior Court of Alameda County, supra, 168 Cal. Rptr. at 181.

Counsel totally failed to raise this issue for the trial court, or to object to the trial court's method of conducting voir dire. In a case of this magnitude, this is not a legitimate trial tactic, but an indication that counsel was ineffective and did not appreciate the nature of death penalty litigation.

(d) The trial court instructed the jury only on the offenses of capital felony murder, and murder in the second degree. There was no instruction on murder in the first degree. The relevant statute in effect at the time of this trial provided:

> All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree. Ark.Stat.Ann. § 41-2204 (Repl. 1964).

The failure of trial counsel to request such an instruction can only be considered ineffective and not a legitimate trial tactic since the maximum punishment for murder in the first degree was life imprisonment.

Although the Arkansas procedure would have permitted, and even seemed to mandate, instructions on lesser included offenses, only an instruction on murder in the second degree was given. See Westbrook v. State, ___Ark.___, 580 S.W.2d 702,708 (1979).

> However, when the evidence presented shows the accused might be convicted of a lesser offense which is necessarily included in the charged, it is the duty of the court, to present instructions to embrace all degrees of a particular offense, and included offenses, to which the evidence is applicable.

The second degree murder instruction was as follows:

> Now, the crime of second degree murder is defined as the unlawful killing of a human being against the laws of the State, without premeditation and without deliberation but with malice and intention to commit the act.
>
> Malice may be expressed on implied, and its existence or lack of existence may be determined from all of the facts and circumstances in the evidence. Malice is implied when no considerable provocation appears, or where all of the circumstances of the assault manifest an abandoned and wicked disposition. [R. 206-207]

It is noted that this instruction in no way mentions the associated felonies that are outlined in the murder in the first degree statute. Therefore, Collins had only one offense that the jury could logically consider if they believed the testimony as to the robbery.

In this instance, the case is not unlike Beck v. Alabama, ___U.S.___, 65 L.Ed.2d 392 (1980). There this Court held that a death penalty may not be imposed under circumstances that do not permit the jury to consider a verdict of guilt on a lesser included non-capital offense. Admittedly, Beck specifically dealt with an Alabama provision that prohibited lesser offenses from being given to the jury. Still, the Court held that procedures that diminish the reliability of the guilt determination would invalidate a death penalty. 65 L.Ed.2d at 403. Collins contends that the manner in which his jury was instructed so diminished the reliability of the guilt determination.

For counsel to fail to seek, and the trial court to fail to follow its duty and give, an instruction on the lesser included offense of murder in the first degree is obviously not a legitimate trial tactic. Under the evidence adduced at this trial, Collins could only have been convicted of capital murder unless the jury

chose to ignore the evidence concerning the robbery. As will be pointed out later, at the very least the Supreme Court of Arkansas should have permitted Collins the opportunity to develop at an evidentiary hearing the basis for this instruction not being given.

(e) Trial counsel failed to attempt in any way to rehabilitate when a juror was excused for cause because of opposition to the death penalty. Venireman Benton Wray indicated that he could serve on a criminal jury, but then stated that he was opposed to the death penalty and would not consider its imposition under any circumstances. [R. 464] Without objection, or without even attempting to explore his feelings by Collins' counsel, the venireman was excused for cause.

Collins was the first person tried on capital felony murder charges under Act 438 of 1975. No longer was the death penalty mandatory after a finding of guilt. Therefore, it was important to determine if Wray, when explained the entire procedure of the bifurcated trial could consider the imposition of the death penalty. The failure of the trial counsel to explore this was another indicia of ineffectiveness for a capital case.

(f) Trial counsel failed to put on any evidence whatsoever during the penalty phase of the trial. The Supreme Court of Arkansas indicated that since none was specifically offered in the Rule 37 petition, the mere allegation was insufficient to warrant a hearing. Collins v. State, 611 S.W.2d at 189. The problem is that a Rule 37 petition, in this instance, is a request for a hearing to develop factual bases for relief.

In any event, the mere failure to put on any evidence during the penalty phase of the trial is prima facie indices of ineffectiveness.

It was pointed out that family members were willing to testify in Collins behalf as to character traits that would have been mitigation evidence. As has been noted

> The lack of any mitigating evidence resulted from the failure of defense counsel to exercise diligence in locating and presenting witnesses who were in position to establish traits of good character. Voyles v. Watkins, 489 F.Supp. 901,909 (N.D.Miss. 1980).

Collins contends that the same situation is present here particularly in light of the fact that under the Arkansas statute, the defendant must show that mitigating circumstances outweigh any aggravating circumstances found to exist in order to avoid a death penalty. Woodard v. State, 261 Ark. 895, 553 S.W.2d 259 (1977); Ark.Stat. Ann. § 41-4710(d)(ii)(Supp. 1975). Thus, when having a burden to prove a death penalty is not justified, and counsel fails to put on any evidence, counsel is simply not providing effective assistance of counsel. This is especially true since, as pointed out above, there was evidence available if counsel had only bothered to properly investigate.

(g) Trial counsel failed to object to the instructions during the penalty phase of the trial that placed the burden of proof as to mitigation on the defendant, and which required Collins to prove that the death penalty was not justified. Although the statute provides that a death penalty must be shown to be justified beyond a reasonable doubt, it also requires a showing of

whether sufficient mitigating circumstances

> as enumerated in Section 12 of this act exist to justify a sentence of life imprisonment without parole. Ark.Stat.Ann. § 41-4701(d)(ii)(Supp. 1975).

As noted in In re Winship, 397 U.S. 358 (1970), the State has the burden of proving elements of an offense beyond a reasonable doubt. Failure to enforce this standard is a denial of due process of law.

Since aggravating circumstances are what evidently justifies the imposition of the irreversible death penalty, then as far as the penalty phase of a capital case is concerned, these are the elements of the offense. Indeed, this Court has indicated that a defendant has a right to notice of the aggravating circumstances. See Presnell v. Georgia, supra.

Therefore, the placing of a burden on the defendant to prove that the death penalty is not justified is unconstitutional. The failure of trial counsel to object to these instructions can only be an indication of lack of experience in this area, or ineffectiveness.

* * * * *

For all of the foregoing reasons, it is clear that Collins was not provided effective assistance of counsel during either the voir dire, guilt phase, or penalty phase of a trial that resulted in his receiving a death penalty. Since under these circumstances this is an indication that Collins was virtually without counsel, this Court should grant certiorari to determine if he was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments.

II. THE FAILURE OF THE SUPREME COURT OF ARKANSAS TO PERMIT COLLINS AN EVIDENTIARY HEARING TO FULLY DEVELOP HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DENIED HIM MEANINGFUL REVIEW AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Supreme Court of Arkansas refused to consider Collins' contention that he had been denied effective assistance of counsel. Indeed, the court determined a factual finding based upon the allegations contained in the petition for permission to proceed to a hearing. This case squarely presents the question of whether a state post-conviction remedy comports with the Due Process Clause of the Fourteenth Amendment when it denies the petitioner the opportunity to fully develop the issues for consideration by the reviewing court.

In Case v. Nebraska, 381 U.S. 336 (1965), this Court was asked to determine if the Fourteenth Amendment requires the States to afford state prisoners some adequate corrective process for hearing and determining claims that their constitutional guarantees have been violated. Before the Court could render an opinion, Nebraska's legislature passed a statute providing such relief. Accordingly, this Court vacated the judgment in light of the new statute. In concurring in the result reached by the Court, Mr. Justice Brennan stated that a post-conviction remedy

> should be sufficiently comprehensive to embrace all federal constitutional claims. In light of Fay v. Noia [372 U.S. 391], it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See Douglas v. Alabama, 380 U.S. 415, 422-423; Henry v. Mississippi, [379 U.S. 443].

Collins contends that the Arkansas procedure does not meet these guidelines.

First, it should be noted that there is a degree of discrimination in the Arkansas procedure. If a defendant has forgone an appeal to the Supreme Court of Arkansas [or now also the Arkansas Court of Appeals], he may apply to the trial court for his evidentiary hearing. The trial court is then required to make written findings and, if necessary, the defendant may appeal to the Supreme Court of Arkansas for review. Rule 37, A.R.Crim.P. (Repl. 1977).

In such an instance, the factual issues are fully developed for the reviewing court and a determination at that point has some indices of reliability. Yet, in Collins' case, the court not only denied a hearing, but decided to make factual findings based upon the allegations raised in the petition. This is in no way a meaningful review. Further, it virtually stops any review of such convictions by state courts, where they should be held, unless the Supreme Court of Arkansas decides for some reason to grant a hearing.

Even in noncapital cases, this Court has indicated repeatedly that in order to comply with standards of due process, a hearing should be held in order to develop the factual allegations presented by the petitioner. See, e.g., Wilde v. Wyoming, 362 U.S. 607 (1960); Sublett v. Adams, 362 U.S. 143 (1960); Palmer v. Ashe, 342 U.S. 134 (1952). Indeed, this Court has returned cases to the state court for a hearing, when one had not been held, since the state court was the proper forum for such consideration. Mooney v. Holohan, 294 U.S. 103 (1935).

Here Collins has had not meaningful review of the claims that he has raised. Since error in a capital case in which a death penalty is imposed could result in the state improperly taking a life, a higher degree of certainty is required.

> Death is a different kind of punishment from any other which may be imposed in this country...[Citations omitted] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the soverign in taking the life of one of its citizens also differs dramatically form any other legitimate state action. Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (Opinion of Stevens, J.)

A review of the opinion in Collins v. State, ___Ark.___, 611 S.W.2d 182 (February 2, 1981), reveals that this different kind of punishment has not received the careful scrutiny that it should have received.

For example, Collins objected that counsel was ineffective because he failed to request, and the trial court failed to present, an instruction on the lesser included offense of murder in the first degree. The Supreme Court of Arkansas determined that

> It is reasonable to assume that counsel chose not to request the instruction on murder in the first degree as a matter of trial tactics and strategy. Collins v. State, 611 S.W.2d at 189.

The Court further stated that counsel offered no support for the position that an instruction should have been offered, and concluded that no prejudice had been shown since the Court had determined there was sufficient evidence to support a guilty verdict of capital murder.

Collins first points this Court to the appendix which includes the Petition for Permission to Proceed Pursuant to Rule 37, A.R.Crim.P. (Repl. 1977) [See

Appendix B, ¶ 9 at Page 5-6; ¶ 10(e) at Page 9]. Not only did Collins present support based upon prior decisions of the Supreme Court of Arkansas, it was pointed out that there was a signficant difference between murder in the first degree and capital murder.

It should be again emphasized that the punishment under the applicable murder in the first degree statute in Arkansas was life imprisonment, or less. The beginning penalty for capital murder was life imprisonment without parole. Ark.Stat.Ann. §§ 41-2204; 4701, et seq (Repl. 1964)(Supp. 1975). Further, the jury would have had to disregard all evidence of the included robbery in order to convict Collins of only murder in the second degree. This Court has condemned a practice that would require the jury to disregard their oaths in order to reach a less severe result. Beck v. Alabama, supra, 65 L.Ed.2d at 407.

The key, however, is that the Supreme Court of Arkansas made an assumption on a critical matter in a death penalty case. This is fundamentally unfair and a violation of due process, particularly where, as here, there is a procedure for permitting an evidentiary hearing to fully develop what reason, if any, trial counsel had for so unwisely taking this risk with Collins' life. Further, the record is also silent that Collins' agreed to such a risk, much less made any kind of intelligent waiver of his right to such an instruction.

Another point deals with the reason that counsel did not put on any evidence during the penalty phase of the trial. The Supreme Court of Arkansas stated that

this was not a grounds for relief because

> Petitioner fails, however, to cit any evidence that was available. Clearly, counsel is not obligated to manufacture evidence if none exists. Since petitioner presented no specific evidence that could have been presented in mitigation, we cannot say counsel was remiss in not presenting testimony during the penalty phase. Collins v. State, 611 S.W.2d at 189.

Again, the Supreme Court of Arkansas made an assumption. It assumed that since Collins' counsel for the petition did not go outside the record, then there was nothing outside the record to present. Yet, a full evidentiary hearing would have revealed that Collins did have mitigation evidence to present.

Further, the Supreme Court of Arkansas apparently does not care to grant hearings even when specific mitigation evidence is presented. As noted in the Rule 37 petition for John Edward Swindler [See Appendix C, ¶ 9, Pages 12-19], specific mitigation evidence available at the time of trial, other than that of the defendant himself, was pointed out to the Supreme Court of Arkansas. Yet, the Court stated in its opinion denying an evidentiary hearing

> We remain unconvinced from the bare allegations of the present petition as to what might, or conceivably could have been used in the sentencing phase, that defense counsel was ineffective. Any error of [sic] omission by counsel was not of such grave nature "as to render the judgment void and open to collateral attack." Swindler v. State, [Slip Opinion at 4]

Indeed, the Court cited Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980), as an indication that it will grant an evidentiary hearing under appropriate circumstances. Since in Neal, supra, the Attorney General conceded error, it must be concluded that absent such

a concession the Supreme Court of Arkansas will make a factual determination based upon a petition.

Collins has pointed out these two examples of the issues raised and handled by the Supreme Court of Arkansas to show that there is no meaningful review of post-conviction rememdies, nor an opportunity for an evidentiary hearing, in such cases. If the Supreme Court of Arkansas had granted the hearing, and the record of that hearing afforded no more basis for relief than that contained in the petition to proceed, then the Court's ruling would have greater reliability. But this is simply not the case.

Collins contends that in order to reach any finality in judgments of this type, state courts must take the responsibility of permitting defendants to fully and completely develop the record for review. The claim that there was ineffective assistance of counsel is a substantial claim that a federally guaranteed constitutional right has been denied. Yet, if states continue, as has Arkansas, to deny claimants the opportunity to develop the record in such cases, any assumption that there is a source of review that comports with due process is erroneous.

This Court was faced with determining in Case v. Nebraska, supra, whether state courts had an obligation to provide meaningful review of claims that defendants' had been denied federal constitutional guarantees. The Court did not have to reach the question because an act of the Nebraska legislature rendered the issue moot.

Arkansas followed the suggestion of the Court by adopting a procedure for pursuing such claims. Now

the question is whether the mere form can be a substitute for providing a substantive procedure to criminal defendants. Collins contends that it cannot.

As pointed out above, and as answered in the opinion of the Supreme Court of Arkansas in this case, factual decisions are being made without a record being fully developed. This, coupled with the fact that defendants that waive their right to appeal seem to be provided a hearing merely upon filing a verified petition with the trial court, is an indication that criminal defendants are not really being provided due process of law in order to adjudicate these claims.

The issue takes on more credence when it is remembered that this is a death penalty case. Collins contends that the Rule 37 procedure now available is not a clearly denied method of presenting claims of a denial of federal rights. Particularly where, as here, claims of ineffective assistance of counsel could not be raised until after trial counsel [John Barry Baker and John Linebarger] had ended their participation in the appeals process and the case was undertaken by other counsel.

This Court should grant certiorari to consider this question. Collins contends that the Court should then remand this case to the Supreme Court of Arkansas with directions to enter an order allowing Collins to proceed to the trial court for a full evidentiary hearing on the claims made in the petition.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Arkansas should be granted and the decision of that court should be reversed. This Court should set this matter for oral argument on the issues outlined above.

Respectfully submitted,

LESSENBERRY & CARPENTER
807 West Third Street
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DATED: May 3, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO._____

CARL ALBERT COLLINS.....PETITIONER

v.

STATE OF ARKANSAS.....RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

APPENDIX

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COUNSEL FOR PETITIONER,
pro hac vice

officers in their probable cause determinations.

There we also recognized that, on appeal, "all presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden of demonstrating error rests upon appellant." When we view the totality of the facts here from the standpoint of common sense and with a pragmatic approach, the evidence is sufficient to constitute probable cause for appellant's initial arrest.

[2] Even though it be said that his initial arrest was illegal, as contended, we think there was a sufficient intervening circumstance which attenuated any taint of that arrest. As discussed previously, the appellant's first statement was exculpatory and non-incriminating. Subsequently, a significant intervening act occurred; i. e., appellant's girl friend, at her request, was permitted to see him. She reported to him she had told the officers about their involvement in the alleged offense, after being led to believe he had admitted his complicity. He responded that he had not. However, shortly thereafter, he decided to give the incriminating statement that is now claimed to be inadmissible because it is tainted by his asserted illegal arrest and incarceration.

In *Sanders v. State, supra*, we said:

> . . . The United States Supreme Court did not hold that the taint of the illegal arrest, followed by the giving of the *Miranda* warnings, reached any and every such statement made by the arrested person regardless of the circumstances. Rather, that court stated that it is entirely possible that persons arrested illegally frequently may decide to confess as an act of free will unaffected by the initial illegality, that the question of voluntariness must be answered in each case upon the particular facts of the case . . .

Surely, *Brown v. Illinois, supra*, and *Dunaway v. New York, supra*, do not require that, in these circumstances, that evidence is inadmissible after appellant was twice acquainted with his *Miranda* rights and had had considerable time, approximately 24 hours, for reflection and deliberation a[bout] any statement he should make.

[3, 4] We next consider appellant's [ar]gument that without the confession the[re] was insufficient evidence to corroborate t[he] testimony of Weaver, an accomplice, w[ho] detailed appellant's complicity before a[nd] after the alleged offense. He correct[ly] cites the rule that one cannot be convict[ed] of a felony upon the testimony of an accom[-]plice unless it is corroborated by other e[vi]dence tending to connect the defendan[t] with the commission of the offense. Ar[k.] Stat.Ann. § 43-2116 (Repl. 1977). Sect[ion] 41-303 provides, *inter alia*, that one is [an] accomplice to the commission of an offen[se] if, for the purpose of facilitating it, he ai[ds] another person in planning or committi[ng] it. When we consider appellant's confe[s]sion, which we hold voluntary, togeth[er] with his testimony at trial where he admi[t]ted the truthfulness of his confession, e[x]cept having knowledge of the criminal pu[r]pose of his codefendants, we find no me[rit] in appellant's argument there was insuff[i]cient corroboration of his accomplice's tes[ti]mony. *Olles (and Anderson) v. State*, [2]61 Ark. 571, 542 S.W.2d 755 (1976).

Affirmed.



Carl Albert COLLINS, Petitioner,

v.

STATE of Arkansas, Respondent.

No. CR 75-110.

Supreme Court of Arkansas.

Feb. 2, 1981.

Defendant, who was convicted of cap[i]tal felony-murder and sentenced to death by electrocution, filed petition for permis[-]sion to proceed under rule governing post

conviction proceedings. The Supreme Court held that: (1) petition for permission to proceed under rule governing postconviction relief filed on December 19, 1980, more than three years after United States Supreme Court denied rehearing on November 28, 1977, was untimely since rule requires such petition must be filed within three years of date of commitment, and (2) petition contained no grounds which rendered judgment void.

Petition denied.

1. Criminal Law ⇐998(14)

Petition for permission to proceed under rule governing postconviction proceedings other than appeal, which was filed more than three years after United States Supreme Court denied rehearing on constitutionality of death penalty statute and thus left standing sentence of death for defendant, and which contained no grounds which would render judgment void, was untimely filed under section of such rule which provides that such petition must be filed within three years of date of commitment. Ark.Stats. § 41-4701 et seq. (Repealed), Rules of Criminal Procedure, Rules 37, 37.1, 37.2(c).

2. Criminal Law ⇐998(2, 5)

Rule governing postconviction proceedings other than appeal was not intended to provide method for review of mere error in conduct of trial or to serve as substitute for appeal; rather, it affords remedy when sentence was imposed in violation of Constitution of United States or of State or is otherwise subject to collateral attack. Rules of Criminal Procedure, Rules 37, 37.1.

3. Constitutional Law ⇐43(1)

Constitutional questions in criminal proceedings are waived if not raised in accordance with controlling rules of procedure.

4. Criminal Law ⇐998(1)

It is imperative that judgments in criminal cases have stability and finality.

5. Criminal Law ⇐998(15)

Petition for permission to proceed under rule governing postconviction proceedings other than appeal offered nothing to show that relationship between jury and police officer who was material witness at trial and who also worked as security officer in courtroom was improperly close, and so did not offer sufficient evidence to warrant setting aside conviction. Rules of Criminal Procedure, Rules 37, 37.1.

6. Criminal Law ⇐1035(6)

Where no objection was made by counsel for defendant in prosecution for capital felony-murder to excusal by trial court of several members of jury venire without affording counsel opportunity to voir dire them on their reasons for not wishing to serve, the matter could not be properly raised on appeal.

7. Jury ⇐75(1)

In prosecution for capital felony-murder, trial court's excusal of several members of jury venire after hearing their reasons for not wishing to serve was proper, even though students are not listed in statute as persons exempt from service. Ark.Stats. §§ 39-107, 39-108.

8. Criminal Law ⇐1035(6)

Lack of individual, sequestered voir dire for jury selection process was not fundamental error in prosecution for capital felony-murder where nothing was presented to show that defendant was entitled to individual, sequestered voir dire.

9. Criminal Law ⇐824(3)

Trial court was under no duty to instruct jury on all possible lesser included offenses in prosecution for capital felony-murder where such instruction was not requested by counsel or defendant; if counsel concluded that such instruction was warranted, it was incumbent upon counsel to request that instruction.

10. Constitutional Law ⇐266(7), 270(2)
Criminal Law ⇐1206(1), 1213

Death penalty statute under which defendant was sentenced to death for capital felony-murder did not violate his Eighth

and Fourteenth Amendment rights by placing burden on defendant to prove mitigating circumstances and by unconstitutionally limiting factors that could be considered in mitigation, in that statute permitted evidence in sentencing stage as to any matters relevant to sentencing and state had burden of proof on issue of punishment. U.S.C.A. Const. Amends. 8, 14; Ark.Stats. §§ 41–4701 et seq., 41-4710(c) (Repealed).

11. Criminal Law ⇐998(8)

Inadequate representation by counsel is ground for postconviction relief where there has not been adequate opportunity to raise question prior to direct appeal. Rules of Criminal Procedure, Rule 37.

12. Criminal Law ⇐998(19)

Errors, omissions, improvident strategy or bad tactics on part of counsel do not require evidentiary hearing on allegation of ineffective assistance of counsel or justify postconviction relief from sentence; petitioner must first show prejudice by alleged incompetence of counsel. Rules of Criminal Procedure, Rule 37.

13. Criminal Law ⇐998(19)

An evidentiary hearing on allegation of ineffective assistance of counsel is not required when allegations of ineffectiveness relate only to matters ordinarily within realm of counsel's judgment. U.S.C.A. Const. Amend. 6. Rules of Criminal Procedure, Rule 37.

14. Criminal Law ⇐641.13(1)

Question presented in evidentiary hearing on allegation of ineffective assistance of counsel is whether petitioner has shown by preponderance of evidence that acts or omissions of attorney resulted in making proceedings a farce and mockery of justice shocking to conscience of court. Rules of Criminal Procedure, Rule 37.

15. Criminal Law ⇐998(16)

Requirement that petition in hearing on allegation of ineffective assistance of counsel show by preponderance of evidence that acts or omissions of counsel resulted in making proceedings a "mockery of justice" is not to be taken literally; it does, however, place substantial burden on petitione in proving that counsel was inadequate Rules of Criminal Procedure, Rule 37.

16. Criminal Law ⇐998(19)

In postconviction proceeding, petitione did not meet burden of showing clearly an convincingly that his attorney was so pa ently lacking in competence that it becam duty of trial court to be aware of it and correct it; thus, assistance of counsel wa not ineffective so as to entitle defendant postconviction hearing. Rules of Crimina Procedure, Rule 37.

17. Criminal Law ⇐1134(2)

In considering petitioner's entitlemen to postconviction hearing on grounds of i effectiveness of counsel, review is limited allegations made in petition for permissio to proceed under rule governing postconvi tion relief other than appeal. Rules Criminal Procedure, Rule 37.

18. Criminal Law ⇐641.13(2)

In prosecution for capital felony-mu der, failure of defense counsel to object excusal by trial court of several members jury venire without affording counsel o portunity to voir dire them on their reason for not wishing to serve was not ineffecti assistance of counsel.

19. Criminal Law ⇐641.13(6)

In prosecution for capital felony mu der, failure of defense counsel to object police officer, who was material witness f prosecution, serving as security officer trial was not ineffective assistance of co sel since defendant did not establish that suffered any prejudice by counsel's agre ment that officer should remain in cour room.

20. Criminal Law ⇐641.13(2)

In prosecution for capital felony-mu der, failure of defense counsel to reque individual sequestered voir dire for sele tion of jury was not ineffective assistan of counsel where defendant was able to ci only one jurisdiction in country which quires such voir dire.

21. Criminal Law ⇐641.13(2)

In prosecution for capital felony-murder, failure of defense counsel to attempt to rehabilitate juror who stated in voir dire that he would not consider capital punishment "under any circumstances" was within realm of trial strategy and was not ineffective assistance of counsel.

22. Criminal Law ⇐641.13(2)

Defense counsel is under no duty to request instruction on lesser included offense of murder in first degree in capital cases.

23. Criminal Law ⇐641.13(2)

In prosecution for capital murder, failure of defense counsel to request instruction on lesser included offense of murder in first degree was not ineffective assistance of counsel where defendant did not show that he was prejudiced by such failure.

24. Criminal Law ⇐641.13(6)

In prosecution for capital felony-murder, failure of defense counsel to put on any evidence during penalty phase of trial was not ineffective assistance of counsel where defendant did not indicate what specific evidence could have been presented in mitigation. Ark.Stat. §§ 41-4701 et seq., 41-4710(e) (Repealed).

25. Criminal Law ⇐641.13(6)

In prosecution for capital felony-murder, defense counsel could not be held accountable for failure to object to introduction into evidence of prior conviction of defendant under "a First Offenders Act" where record did not support defendant's allegations that he was sentenced as part of a first offenders program.

Thomas M. Carpenter, Little Rock, for petitioner.

Steve Clark, Atty. Gen. by Victra L. Fewell, Asst. Atty. Gen., Little Rock, for respondent.

PER CURIAM.

Petitioner Carl Albert Collins was convicted by a jury in 1974 of capital felony murder and sentenced to death by electrocution. The primary issue on appeal was the constitutionality of Act 438 of 1973, Ark.Stat.Ann. § 41-4701 et seq. (Supp. 1973), which reinstated the death penalty. This Court found the statute constitutional and affirmed the conviction on December 22, 1975. *Collins v. State*, 259 Ark. 8, 531 S.W.2d 13 (1975). Motion to stay mandate pending appeal to the United States Supreme Court was granted February 2, 1976. Petition for certiorari for review of this Court's judgment affirming the judgment of the circuit court was filed in the United States Supreme Court and that Court, 429 U.S. 808, 97 S.Ct. 44, 50 L.Ed.2d 69, vacated this Court's judgment insofar as it left undisturbed the death penalty imposed and ordered the cause remanded for consideration in light of *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Mandate vacating judgment was filed in this Court November 18, 1976. Upon reconsideration, the Arkansas Supreme Court again concluded that the death penalty under Arkansas statutes was constitutional and affirmed the judgment on March 7, 1977. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977). Certiorari was denied, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158, and the mandate was forwarded to the governor of this state October 25, 1977. The United States Supreme Court denied rehearing on November 28, 1977, at 434 U.S. 977, 98 S.Ct. 540, 54 L.Ed.2d 471 (1977).

[1] Collins filed his petition for permission to proceed under Rule 37 on December 19, 1980, more than three years after the United States Supreme Court denied rehearing. Rule 37.2(c), Arkansas Rules of Criminal Procedure, Ark.Stat.Ann.V. 4A (Supp.1979) provides that such a petition must be filed within three years of the date of commitment. The petition is clearly un-

timely and will be denied unless the grounds asserted are such as to render the judgment against Collins void. Since we find no grounds contained in Collins' petition which will render the judgment void, the petition is denied.

[2–4] Rule 37 was not intended to provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. *Clark v. State*, 255 Ark. 13, 498 S.W.2d 657 (1973). As the Rule states, it affords a remedy when the sentence was imposed in violation of the constitution of the United States or of this State or "is otherwise subject to collateral attack." Rule 37.1; *Swisher v. State*, 257 Ark. 24, 514 S.W.2d 218 (1974); *Thacker v. Urban*, 246 Ark. 956, 440 S.W.2d 553 (1969); *Clark v. State*, 242 Ark. 584, 414 S.W.2d 601 (1967). The present petition presents a number of issues all of which are alleged to raise issues so fundamental as to render the sentence and judgment void and open to collateral attack. The issues, however, could, and should, have been raised at trial or on direct appeal. It is well settled that constitutional questions are waived if not raised in accordance with controlling rules of procedure. *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); *Stembridge v. Georgia*, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952); *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934, *reh. denied*, 268 Ark. 315, 599 S.W.2d 729 (1980); *Williams v. Edmondson*, 257 Ark. 837, 520 S.W.2d 260 (1975); *Orman v. Bishop*, 245 Ark. 887, 435 S.W.2d 440 (1968). As stated in *Hulsey*, supra, in this Court, contentions not argued by the appellant on first appeal are waived. *Sarkco v. Edwards*, 252 Ark. 1082, 482 S.W.2d 623 (1972). It is imperative that judgments in criminal cases have stability and finality. *Hulsey*, supra.

[5] Petitioner first alleges that the judgment is void pursuant to *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) because a material witness at the trial, Sgt. Quimby Johnson, also worked as a "security person and perhaps a bailiff for the jury." In *Turner* two deputy sheriffs who were the principal prosecution witnesses were in continuous associa[tion] with the jurors, eating dinner with the[m] running errands for them and driving the[m] to and from the lodgings. The Court fou[nd] that the two had been the "official guar[di]ans" of the jury and that the jury w[as] likely to find their testimony more credi[ble] by virtue of that relationship. Here, t[he] petitioner has offered nothing to show th[at] such a relationship existed; however, t[he] record does indicate that Sgt. Johns[on] served in some capacity as a security of[fi]cer.

MR. GIBSON (Prosecuting Attorn[ey]): For purpose of security in the courtroo[m] the State would request that the Rule [be] waived as to Sheriff's Deputy Snow a[nd] Sgt. Quimby Johnson, Investigator, bo[th] of which may or may not testify. Th[ere] is a possibility they will, but they a[re] about the only good security officers [we] have.

THE COURT: There might be so[me] sort of feeling in the local community, [as] for the protection . . .

MR. LINEBERGER (Defense Counse[l]): We have no objections. We have d[is]cussed that with the prosecutor.

THE COURT: I think we should ha[ve] adequate protection against any kind [of] emotional outburst that might arise.

MR. GIBSON: Their testimony wo[uld] be relatively minor.

THE COURT: Then it's agreeab[le]

MR. LINEBERGER: It's agreeab[le] your honor.

The allegations of the petition are appa[r]ently based on this exchange, but the pe[ti]tion does not offer sufficient evidence [to] warrant setting the conviction aside. Pe[ti]tioner also alleges, that even if this Cou[rt] does not find merit to the allegation tha[t] Sgt. Johnson's presence in the courtroo[m] renders the judgment void, there remains [a] question of whether counsel was ineffecti[ve] in failing to object to his presence. Th[is] allegation shall be addressed later.

[6] Petitioner next alleges that [the] judgment is void because the trial cou[rt] excused several members of the jury ven[ire]

without affording counsel the opportunity to *voir dire* them on their reasons for not wishing to serve. No objection was made by the trial counsel to the potential jurors' being excused by the Court and the matter could not therefore be properly raised on appeal. *Clark v. State*, 264 Ark. 630, 573 S.W.2d 622 (1978). Petitioner asserts that the exclusion of these jurors for cause violated this Court's ruling in *Hall v. State*, 259 Ark. 815, 537 S.W.2d 155 (1976). This argument is without merit. In *Hall*, the trial court excused all farmers (some 25–30 persons) without requiring any of them to appear and ask to be excused, and this Court found such a practice to be deliberate and systematic exclusion of a large class of eligible jurors, *Hall*, at 818–819, 537 S.W.2d 155.

[7] In the instant case, the trial court heard the reasons given by the four potential jurors for not wishing to serve and properly exercised its discretion in excusing them. Furthermore, even though students are not listed in Ark.Stat.Ann. § 39–108 (Supp.1979) as persons exempt from service, the trial court has the discretion to excuse any juror "when, for any reason, his own interests or those of the public will, in the opinion of the Court be materially injured by his attendance." Ark.Stat.Ann. § 39–107 (Supp.1979).

[8] Petitioner also challenges the judgment on the grounds that the lack of individual, sequestered *voir dire* made the jury selection process unreliable. In support of his allegation, petitioner cites only one case, the 1980 California Supreme Court opinion in *Hovey v. Superior Court on Alameda County*, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal.Rptr. 128, 181 (August 28, 1980), which we do not consider controlling. Petitioner has presented nothing to show that petitioner was entitled to an individual, sequestered *voir dire*.

[9] Petitioner argues that the judgment is void because the Court had a duty to instruct the jury on all possible lesser included offenses, including murder in the first degree. Petitioner alleges that *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979) imposes a duty upon the trial court to give instructions on all applicable lesser included offenses even though defense counsel has not requested such instructions. There is no such duty imposed on the trial court by *Westbrook*. *Westbrook* presented a situation quite different from this case. There the case went to the jury with only one possible conviction—capital murder. In petitioner's case the jury was instructed as to second degree murder and clearly had a choice as to whether either charge was supported by the evidence. This Court has recently reiterated that it is reversible error to refuse to give a requested instruction where there is the slightest evidence to warrant such an instruction, *Brewer v. State*, 271 Ark. 254, 599 S.W.2d 141 (1980); *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980), but no duty was placed on the trial court to give an instruction not requested by counsel. If counsel concludes that a particular instruction is warranted, it is incumbent upon counsel to request that instruction.

[10] Petitioner next contends that the judgment is void because Act 438 of 1973 unconstitutionally placed a burden on petitioner to prove mitigating circumstances and unconstitutionally limited the factors that could be considered in mitigation, a violation of the "premise" in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Lockett*, a four-judge plurality held that the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, at 605, 98 S.Ct. at 2965. This Court has considered the effect of *Lockett*, in *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980). In *Neal*, as in this case, where the appellant argued that Ark.Stat.Ann. § 41–4701 et seq. (Supp.1973), repealed by Act 280 of 1975 (Crim.Supp.1975), unconstitutionally limited the mitigating circumstances the jury could consider, this Court found:

The Ohio statute considered in *Lockett* was quite unlike the Arkansas statute applied in Neal's trial. That Ohio law required a trial judge to impose the death penalty unless he found by a preponderance of the evidence that (1) the victim has induced or facilitated the offense; (2) it was unlikely that Lockett would have committed the offense but for the fact that she was under duress, coercion or strong provocation; or (3) the offense was primarily the product of the accused's psychosis or mental deficiency. The statute under which appellant was tried was materially different. It permitted evidence in the sentencing stage as to any matter relevant to sentencing. Ark.Stat.Ann. § 41–4710(c) (Supp.1973). Under that Act Ark.Stat.Ann. § 41–4701 et seq. (Supp.1973) the jury was not compelled to impose the death sentence whenever it found aggravating circumstances but no mitigating circumstances existed beyond a reasonable doubt to justify sentence to death. *Neal*, 270 Ark. at 449–450, 605 S.W.2d 421.

As in *Neal*, this Court finds that the statute does not unconstitutionally limit the factors that can be considered in mitigation. Further, this argument was addressed by the Court on first appeal and this Court found that Act 438 of 1973 was valid.

With regard to petitioner's allegations that Act 438 of 1973 unconstitutionally placed a burden on petitioner to prove mitigating circumstances, this Court held on first appeal that the state had the burden of proof in the issue of punishment. *Collins v. State*, 259 Ark. 8 at 15, 531 S.W.2d 13.

[11–16] Finally, petitioner alleges ineffective assistance of counsel. Inadequate representation by counsel is a ground for postconviction relief where there has not been an adequate opportunity to raise the question prior to direct appeal. *Hillard v. State*, 259 Ark. 81, 531 S.W.2d 463 (1976). Errors, omissions, improvident strategy or bad tactics on the part of counsel do not require an evidentiary hearing on an allegation of ineffective assistance of counsel or justify postconviction relief from a sentence. *Clark v. State*, 255 Ark. 13[illegible] S.W.2d 657 (1973). The petitioner [illegible] first show prejudice by the alleged incom[illegible] tence of counsel. *Leasure v. State*, [illegible] Ark. 961, 497 S.W.2d 1 (1973). An evi[illegible] tiary hearing is not required when the [illegible] gations of ineffectiveness relate only [illegible] matters ordinarily within the realm [illegible] counsel's judgment. *Leasure*, supra, [illegible] question presented in an evidentiary [illegible] ing is whether the petitioner has shown [illegible] a preponderance of the evidence that [illegible] acts or omissions of the attorney result[illegible] making the proceedings a farce and [illegible] ery of justice shocking to the conscience [illegible] the court. *Sheppard v. State*, 255 Ark. [illegible] 498 S.W.2d 668 (1973). This Court has [illegible] that "the mockery of justice" standard [illegible] the determination of ineffectiveness [illegible] counsel is not to be taken literally. It [illegible] however, place a substantial burden on [illegible] petitioner in proving that counsel was [illegible] equate. *McDonald v. State*, 257 Ark. [illegible] 520 S.W.2d 292 (1975). Petitioner in [illegible] case had the burden of showing clearly [illegible] convincingly that his attorney was so [illegible] ently lacking in competence that it be[illegible] the duty of the trial court to be aware [illegible] and to correct it. Petitioner has not [illegible] that burden.

[17, 18] In considering petitioner's [illegible] titlement to a postconviction hearing on [illegible] ground of ineffectiveness of counsel, we [illegible] limited to the allegations of the petition [illegible] Petitioner alleges that his counsel did [illegible]

1. Object to the exclusion of the [illegible] jurors discussed earlier;
2. Object to Sgt. Johnson's serving [illegible] security officer at the trial;
3. Request an individual, sequest[illegible] *voir dire* of the jury;
4. Attempt to rehabilitate juror E[illegible] Wray;
5. Request an instruction on the [illegible] included offense of murder in [illegible] first degree;
6. Put on any evidence during the p[illegible] ty phase of the trial and did no[illegible] quest that the "instructions on [illegible] gation be modified to conform [illegible] the law;"

7. Object to the introduction into evidence of a prior conviction under a "First Offenders Act;" and

8. Object to instructions on mitigation.

With regard to the first allegation, we have stated that it was within the discretion of the trial court to excuse the jurors in question. Further, petitioner has not shown that he was prejudiced by the court's action or that counsel's failure to object was not a legitimate trial tactic.

[19] The matter of counsel's failure to object to Sgt. Johnson's presence in the courtroom for security purposes would present a more pressing question if the petitioner had offered any substantiation for the allegation that petitioner was prejudiced by Sgt. Johnson's presence. As petitioner correctly contends, a witness should not be allowed to interact with the jury to the extent that his credibility is enhanced in the eyes of the jurors, but petitioner has failed to show that Sgt. Johnson had any direct contact with the jury during the trial. The mere allegation, without support, that Johnson was "perhaps" a bailiff for the jury does not establish in itself that petitioner suffered any prejudice by counsel's agreeing that Johnson should remain in the courtroom.

[20] Counsel's failure to request an individual sequestered *voir dire* was not an error on counsel's part. Petitioner was able to cite only one jurisdiction in this country which requires such an *voir dire*. It is obvious that counsel should not be expected to request what amounts to an extraordinary practice.

[21] Petitioner alleges that counsel should have attempted to rehabilitate Benton Wray, a juror who stated in *voir dire* that he would not consider capital punishment "under any circumstances." Petitioner contends that *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 399 (1976) somehow place a duty on counsel to examine at length a witness who states opposition to the death penalty in hopes of getting him to equivocate. This argument is without merit. Counsel's decision not to question a particular juror is within the realm of trial strategy.

[22, 23] Petitioner next argues that counsel was obligated to request an instruction on the lesser included offense of murder in the first degree, or at least, that counsel was obligated to record the reasons for not requesting such an instruction. Petitioner presents no support for this argument, and we find no duty to request an instruction on the lesser included offense of murder in the first degree in capital cases. It is reasonable to assume that counsel chose not to request the instruction on murder in the first degree as a matter of trial tactics and strategy. This Court found on appeal that there was sufficient evidence to sustain a conviction of capital felony murder. *Collins*, 261 Ark. at 223, 548 S.W.2d 106, and petitioner has not shown that he was prejudiced by counsel's not requesting an instruction on murder in the first degree.

[24-25] Counsel did not put on any evidence during the penalty phase of the trial and petitioner alleges that this can only be deemed ineffective assistance of counsel. Petitioner fails, however, to cite any evidence that was available. Clearly, counsel is not obligated to manufacture evidence if none exists. Since petitioner presented no specific evidence that could have been presented in mitigation, we cannot say that counsel was remiss in not presenting testimony during the penalty phase. Petitioner further alleges that counsel should have objected to the introduction into evidence of a prior conviction under "a First Offenders Act." The record indicates petitioner was sentenced in 1973 to seven years in the Arkansas Department of Correction with four years suspended for armed robbery. The commitment order recommends that petitioner be incarcerated "at Tucker Prison with first offenders . . . ." The record does not support petitioner's allegations that he was sentenced as part of a first offenders program and counsel therefore cannot be held accountable for failure to object to

introduction of the conviction on that ground.

Petitioner also stated that counsel should have objected to "explanations" concerning the prior offense given by the trial court. He does not enlarge on this and this Court cannot search the record seeking to determine what is behind petitioner's conclusory allegation.

Finally, petitioner argues that counsel should have objected to the instruction on mitigation that allegedly placed a burden on petitioner to prove mitigating circumstances beyond a reasonable doubt. The record shows that counsel for petitioner did object to the trial court's instruction on mitigating circumstances (T.277) and the trial court responded by clarifying its remarks:

> The matter of mitigating circumstances is an opportunity the defendant has. There is no burden on him at all. The burden is on the state in the whole case . . . (T.278)

Petition denied.



Dennis Edward LOANE, Appellant,

v.

STATE of Arkansas, Appellee.

No. CR 80-201.

Supreme Court of Arkansas.

Feb. 2, 1981.

Rehearing Denied March 2, 1981.

Defendant was convicted before the Circuit Court, Sebastian County, John G. Holland, J., of aggravated robbery, and he appealed. The Supreme Court, Adkisson, C. J., held that: (1) defendant intelligently and knowingly waived his right to counsel at second postinformation lineup, and (2) trial court did not err in refusing to allo defendant to introduce hearsay evidenc that his fingerprints were not found a place where alleged robbery occurred unle the prosecution was allowed to introduce i hearsay evidence that fingerprints of a leged accomplice were found at scene bas on asserted ground that finding of alleg accomplice's fingerprints at scene was irre evant.

Affirmed.

Purtle, J., dissented and filed opini

1. **Criminal Law ⇐339.11(3)**

State, during hearing on defendan motion to suppress identification testimon bears burden of showing that waiver defendant's constitutional right to couns at postinformation lineup was given volu tarily, knowingly, and intelligently and w based upon his receiving adequate warnin as to his right to counsel. U.S.C.A.Cons Amend. 6.

2. **Criminal Law ⇐641.2**

Defendant has right to presence counsel at postinformation lineup absent Knowing and intelligent waiver of th right.

3. **Criminal Law ⇐339.8(7)**

Defendant effectively waived right counsel at postinformation lineup where d fendant was on record as having contin ously requested a lineup on both charg pending against him, where he knew a witnesses did not view first lineup, agreed to shave his beard and mustache f second lineup, he discussed with his atto ney need for attorney's presence at seco lineup, and he was informed of his counsel absence prior to lineup and was asked if h chose to proceed, despite the fact that d fendant was mistaken as to the purpose the second lineup.

4. **Criminal Law ⇐1158(4)**

Supreme Court will not set aside ruli that defendant voluntarily, knowingly, an intelligently waived his right to couns during lineup confrontation unless it clearly erroneous.

IN THE SUPREME COURT OF ARKANSAS

CARL ALBERT COLLINS PETITIONER

v. No. CR 75-110

STATE OF ARKANSAS RESPONDENT

FILED
DEC 19 1980
DONA L. WILLIAMS
CLERK

PETITION FOR PERMISSION TO PROCEED
PURSUANT TO RULE 37, A.R.Crim.P. (Repl. 1977)

Comes the petitioner, Carl Albert Collins, through his counsel, Lessenberry & Carpenter, serving pro bono, and for his petition states:

1. Petitioner was charged with capital felony murder pursuant to Act 438 of 1973, in the Washington Circuit Court. After entering a plea of not guilty, and a trial by jury, petitioner was convicted of capital murder. The jury then sat again to consider punishment, and returned a verdict of death by electrocution. Petitioner is presently awaiting execution in the Arkansas Department of Correction.

2. Petitioner appealed his conviction and sentence to this Court, and to the United States Supreme Court. The conviction and sentence were ultimately affirmed. Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), judgment vacated, Collins v. Arkansas, 429 U.S. 966 (1976), aff'd, Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), cert. denied, 434 U.S. 878 (1977), rehearing denied, 434 U.S. 977 (1977).

3. Petitioner is indigent and counsel is serving pro bono since there is no provision for appointing counsel to assist indigent defendants with petitions for post-conviction relief. See Neal v. State, ___Ark.___, 605 S.W.2d 421 (September 29, 1980).

4. Petitioner seeks relief pursuant to the provisions of Rule 37.1, A.R.Crim.P. (Repl. 1977), for the reasons set out below. Petitioner contends that these reasons establish that the judgment in this case is void and that he is entitled to relief. Pursuant to the Arkansas

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Rules of Criminal Procedure, petitioner is asking this Court to grant permission for him to proceed to the trial court for an evidentiary hearing on the issues raised in the petition. Rule 37.2(a), A.R.Crim.P. (Repl. 1977).

5. For the reasons set out below, and because it is clear that "death is a different kind of punishment from any other which may be imposed in this country," petitioner asks that the Court grant him this hearing. Gardner v. Florida, 430 U.S. 349, 357 (1977).

6. Petitioner's judgment is void because of the improper use of a law enforcement officer witness as security personnel in the courtroom. During the course of the trial Sergeant Quimby Johnson, an investigator with the Arkansas State Police, was called to testify. Sgt. Johnson was a material witness in this case. His testimony was that he was the first person on the scene of the crime; that he found certain information that would suggest that a robbery had been committed--i.e., a wallet missing from the deceased's pants, a telephone pulled from the wall, the trail of blood--and he found the circumstantial evidence to suggest that petitioner had committed this crime--i.e., the truck that was stolen from the victims, the shotgun, the sawed-off portion of the shotgun. He also was used to introduce a photograph to the jury of the deceased victim of this offense.

This use of a law enforcement officer working as a security person in the trial, and perhaps as a bailiff for the jury, who also served as a witness is a violation of petitioner's rights to due process of law under the Fourteenth Amendment to the United States Constitution. As such, the death penalty that he received cannot be

carried out. See Turner v. Louisiana, 379 U.S. 466 (1965). If there is any doubt in the Court's mind about the propriety of setting aside the conviction on this basis, this matter should be returned to the Washington Circuit Court pursuant to Rule 37, A.R.Crim.P. (Repl. 1977), for an evidentiary hearing to determine the basis of Sergeant Johnson's association with the jury during its deliberations, or when it was sequestered for purposes of deliberation in the trial.

7. Petitioner's judgment is void because prior to the seating of the jury in this matter the trial court excused certain members of the jury venire without having given counsel the opportunity to voir dire these jury members, and without having the jurors come forth to determine if their basis for not wanting to serve on the jury was a basis for excusal under Arkansas law. Specifically, prior to the trial the Court, on its own motion, excused two students at the University of Arkansas at Fayetteville. This was an improper exclusion for cause under Arkansas statutes. Specifically, the bases for excluding jurors for cause without consent of counsel are set out in Ark.Stat.Ann. § 39-108 (Supp. 1979). These do not include students.

Further, during the course of the voir dire examination, the Court excluded another student with a pending test without having first determined if the test could be postponed. This was done without objection of counsel.

Finally, the trial court excluded a fourth juror that indicated there may be a hardship on his business if he were forced to serve. However, this same juror indicated that he could serve on the jury.

The practice of this type of exclusion for cause has been condemned by this Court in prior opinions. See Hall v. State, 259 Ark. 815, 537 S.W.2d 155 (1976). Three of these jurors were excluded without counsel being given the opportunity to object. The fourth juror was excused without the objection of counsel. Still, these jurors comprised eight percent (8%), of those jurors that were questioned in this matter. For this reason, the judgment is void as violative of petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article II of the Arkansas Constitution, and the Arkansas statutes set out above. For this reason, the Court should set aside the conviction and sentence received in this case.

8. Petitioner alleges that the method of questioning the jurors during the voir dire examination in this case failed to provide for the reliability in jury selection, and therefore in the jury verdict, because the jury was not questioned by individual, sequestered voir dire. As can be seen from the answers of the potential jurors during the course of voir dire, many of their answers were not spontaneous because they related to other answers that they had heard from other jurors.

It was recently stated by the California Supreme Court that because of the peculiar nature of the voir dire in death penalty cases, and the necessity to "death qualify" a jury, that the only way to achieve reliable answers was to have individualized, sequestered voir dire. Hovey v. Superior Court of Alameda County, ___Cal.3d___, ___P.2d___, 168 Cal.Rptr. 128 (August 28, 1980). There the Court stated

> The most practical and effective procedure available to minimize the untoward effects of death-qualification is individualized, sequestered voir dire. Because jurors

> would then witness only a single death-qualifying voir dire--their own--each individual juror would be exposed to considerably less discussion and questioning about the various aspects of the penalty phase before hearing any evidence of guilt. Such a reduction in the pretrial emphasis on penalty should minimize the tendency of a death-qualified jury to presume guilt and expect conviction. Hovey v. Superior Court of Alameda County, supra, 168 Cal. Rptr. at 181.

The otherwise potential for bias or unreliable answers of the jury, and thus the accompanying unreliability of the penalty imposed, render this judgment void.

9. Petitioner's judgment is void because the Court did not instruct the jury on all possible lesser included offenses; specifically, there was no lesser included offense given for the offense of murder in the first degree. Ark.Stat.Ann. § 41-2204 (Repl. 1964). This is a duty that this Court has imposed upon the trial court. See Westbrook v. State, ___Ark.___, 580 S.W.2d 702,708 (1979)

> However, when the evidence presented shows the accused might be convicted of a lesser offense which is necessarily included in the charged, it is the duty of the court to present instructions to embrace all degrees of a particular offense, and included offenses, to which the evidence is applicable. [Emphasis added]

Although Westbrook, supra, dealt with a situation in which appellant had specifically requested instructions on lesser offenses, this Court went further and imposed a duty on the trial court to give all applicable lesser included offense instructions.

The relevant statute on murder in the first degree provided

> All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree.

It could be argued that because of the overlapping language in this statute and that of Act 438 of 1973, that this statute was repealed by the 1973 Act. However, there was no specific repealer of this statute, only of acts that are inconsistent with this act.

In light of this Court's opinion in Cromwell v. State, ___Ark.___, 598S.W.2d733(May 27, 1980), dealing with a similar overlap in the present capital murder statute, Ark.Stat.Ann. § 41-1501 (Repl. 1977), and the statute on murder in the first degree, Ark.Stat.Ann. § 41-1502 (Repl. 1977), there appears to be no conflict. As stated by the Court in that opinion

> The actual wording of the statute may have been chosen to lighten the possible punishment that might be imposed for conduct falling within the strict definition of capital murder--a consequence that might be acceptable to both prosecution and defense. Cromwell v. State, supra, 598 S.W.2d at 735.

In other words, the Court was willing to permit the jury to make an unfettered determination that a defendant could be convicted of a lesser charge of first degree murder for an offense that met the strict definition of capital murder. By doing so, the Court seems to imply that the present situation would also be permissible. This is particularly true in light of the fact that there is a different element present between Act 438 of 1975, and Ark.Stat.Ann. § 41-2204 (Repl. 1964)--i.e, the requirement in the capital felony murder act that the action be done under circumstances manifesting extreme indifference to the value of human life, as opposed to the provision of the first degree murder statute that it be committed during the perpetration of the included felonies.

It was error, then, for the Court not to properly instruct the jury. Its failure to do so renders the verdict and judgment void, and requires that the death sentence be set aside.

8. Petitioner's judgment is void because Act 438 of 1975 unconstitutionally placed a burden on petitioner to prove mitigating circumstances, as pointed out in the instructions, and also because the language of the statute appeared to unconstitutionally limit the factors that could be considered in mitigation. As such, the statute violates the premise of Lockett v. Ohio, ___U.S. ___(1978),

10. Petitioner's judgment is void because of the above reasons. In addition, and in the alternative, without waiving any of the above objections, petitioner states that he was denied effective assistance of counsel at the trial of this matter in the following ways:

(a) Counsel did not object to the exclusion of the four jurors mentioned in paragraph 7 above. By not so objecting, counsel did not provide this Court with a basis for determining the propriety of the Court's ex parte action which, under decisions of this Court, appears to have been reversible error. This cannot be deemed to be a trial tactic, but a failure by counsel to adequately preserve an essential constitutional right of the petitioner at trial.

(b) Counsel acquiesced in permitting law enforcement officer/witnesses to remain in the courtroom for security, and to be involved in that manner with the jury, despite the fact that the United States Supreme Court has indicated that that is a practice that cannot be condoned. This is particularly true in light of the fact that Sergeant Johnson gave such crucial testimony as to the guilt determination of petitioner.

(c) Counsel did not provide adequate assistance to assure the reliability of potential veniremen's answers by requesting individual, sequestered voir dire of the jury. In light of the sensitive nature of this questioning,

this cannot be deemed a legitimate trial tactic, and petitioner should be granted an evidentiary hearing to determine if counsel fully appreciated the implications of this situation.

(d) Counsel did not provide adequate assistance of counsel when it failed to attempt to rehabilitate juror Benton Wray. Wray stated on voir dire by the prosecuting attorney that he could not consider the death penalty under any circumstances. [R. 464] Counsel for petitioner, however, did not request the opportunity to explore these feelings further with Mr. Wray.

It has been shown that despite statements in opposition to the death penalty, jurors on careful examination will admit that in the appropriate case they could consider the imposition of the death penalty. In this matter, it is unclear if counsel was intimidated by the presence of other jurors during this voir dire examination--one other reason to permit individual, sequestered voir dire--or, if counsel did not understand the meaning of Witherspoon v. Illinois, 391 U.S. 510 (1968), and cases interpreting it, and understand the duty to try and rehabilitate jurors such as Mr. Wray.

Since the United States Supreme Court in Witherspoon, supra, stated that a death penalty could not be carried out if jurors opposed to its imposition were excluded from the jury, then the basis for counsel failing to attempt this rehabilitation should be explored. This is particularly true in light of the Court's recent pronouncement that the Witherspoon principle applies to the improper exclusion of even a single juror. See Davis v. Georgia, 429 U.S. 122, 123 (1976). Of course, Davis, supra, makes this determination even if the prosecuting attorney had additional peremptory challenges available at the time of the exclusion.

An evidentiary hearing on this matter would develop the basis for counsel's failure to attempt the rehabilitation of this juror. Further, the hearing would allow present counsel to more fully develop the record as to how this process is done, and whether the attempt at rehabilitation is the type of thing that would be done by defense counsel trying the capital case--an area of criminal defense work that has now become highly specialized.

(e) Counsel did not provide adequate assistance of counsel by failing to request an instruction on the lesser included offense of murder in the first degree as defined by Ark.Stat.Ann. § 41-2204 (Repl. 1964). Since the instruction would have permitted the jury an alternative to the capital murder conviction, much as the present statutes allow, then this instruction should have been requested. Petitioner makes this argument without waiving the above argument that it was the duty of the trial court to give this instruction on its own motion. Should the Court decide, contra to Westbrook v. State, supra, that the trial court had no such duty, then counsel was under an obligation to request the appropriate instruction, or place in the record affirmative reasons for not requesting such an instruction.

An evidentiary hearing on this point would permit petitioner the opportunity to explore counsel's reason for omitting a requested instruction on murder in the first degree.

(f) Counsel did not provide adequate assistance of counsel when they failed to put on any evidence during the course of the penalty phase of the trial in this matter, or to request that the instructions on mitigation be modified to conform with the law.

The United States Supreme Court mandated in Gregg v. Georgia, 428 U.S. 153 (1976), that death penalty trials would have to consist of two parts: a determination of guilt/innocence; a determination of penalty. In compliance with the earlier indications of the Court in Furman v. Georgia, 408 U.S. 238 (1972), Arkansas passed Act 438 of 1973 setting up the bifurcated trial procedure in capital cases.

The Court further stated, in Gardner v. Florida, 430 U.S. 349 (1977):

> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by the statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Gardner v. Florida, supra, 430 U.S. at 358 (judgment of the Court).

In short, penalty is a critical stage of the proceedings, and the rights to effective assistance of counsel apply equally to this stage of the proceedings as to the guilt determination phase.

The failure to put on any evidence in mitigation of the charge of capital murder, particularly in light of the fact that mitigation is not limited to the factors listed by the statute, can only be deemed ineffective assistance of counsel at a critical stage of the proceedings.

Argument of counsel is not sufficient to attempt to show mitigating circumstances. This is true for two reasons. First, there is a burden of proof placed on the defendant (which will be discussed later) to show that a mitigating circumstance exists. Secondly, arguments of counsel are not evidence and cannot be considered by the jury as such. In short, there is no evidence in mitigation to meet a burden on the

mitigation in a capital case if the attorney does not put on any evidence. This cannot be deemed a trial tactic and an evidentiary hearing should be held to determine if trial counsel fully understood the second phase of the capital case in preparing petitioner's defense. Further, it should be determined if, because of lack of funds, counsel was prevented for fully developing the penalty phase of the trial for an indigent defendant.

(f) Counsel did not provide adequate assistance of counsel when he failed to object to the introduction into evidence of a prior conviction under a First Offenders Act, or to object to explanations concerning that prior offense given by the trial court to the jury. Since this prior offense was found to be an aggravating circumstance, the error cannot be deemed a legitimate trial tactic and an evidentiary hearing should be held to determine the reason for counsel's failure to make this objection.

(g) Counsel did not provide adequate assistance of counsel when he failed to object to the instructions on mitigation that placed a burden on petitioner to prove a mitigating circumstance, but did not establish what the burden of proof was to be on such a circumstance. As given in the instruction [R. 275], it is unclear, and the jury is given no guidance as to what burden of proof to give to the existence of a mitigating circumstance.

WHEREFORE, premises considered, petitioner, Carl Albert Collins, prays that this Court grant his petition for permission to proceed to the trial court for an evidentiary hearing on this petition under Rule 37, A.R.Crim.P. (Repl. 1977).

Respectfully submitted,

LESSENBERRY & CARPENTER
807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

By: Thomas M. Carpenter
Thomas M. Carpenter

VERIFICATION

I, Thomas M. Carpenter, having been duly sworn according to law, do hereby state that the allegations in the above petition for true and correct to the best of my knowledge and belief.

Thomas M. Carpenter
Thomas M. Carpenter

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

Subscribed and sworn to before me this 19th day of December, 1980.

Josie Lester
NOTARY PUBLIC

My commission expires:
April 6, 1982

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, serving as counsel pro bono for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition has been seved on opposing counsel this 19th day of December, 1980, by mailing a copy of same to the Honorable Victra Fewell, Assistant Attorney General, Office of the Attorney General, Justice Building, Little Rock, Arkansas, 72201, with sufficient postage attached thereto.

Thomas M. Carpenter
Thomas M. Carpenter

THIS IS A CAPITAL CASE
EXECUTION IS IMMINENT

IN THE SUPREME COURT OF ARKANSAS

JOHN EDWARD SWINDLER — PETITIONER

v. — No. CR 79-116

STATE OF ARKANSAS — RESPONDENT

PETITION FOR PERMISSION TO PROCEED
PURSUANT TO RULE 37, A.R.CRIM. P. (REPL. 1977)

Comes the petitioner, John Edward Swindler, through his counsel, serving *pro bono publico*, and for his petition states:

1. Petitioner was charged with capital murder in the Sebastion Circuit Court. After trial by jury, petitioner was convicted on said charge and sentenced to death by electrocution. This original conviction and sentence were reversed by this Court because of the pervasive, prejudicial pretrial publicity. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978). Upon retrial petitioner was granted a change of venue to the Scott Circuit Court. Petitioner was again convicted and sentenced to death by electrocution. This Court affirmed the second sentence and conviction. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), *cert. denied*, ___U.S.___(December 8, 1980).

On December 21, 1980, Governor Bill Clinton issued an executive proclamation scheduling petitioner's execution for Saturday, March 21, 1981. Petitioner filed a petition for stay of execution on Friday, March 13, 1981, with this Court, stating *inter alia* that this petition would be filed on Monday, March 16, 1981, and asking that this Court stay the pending execution until considering the merits of this petition. Action needs to be taken on the petition for stay of execution forthwith.

2. This Court has approved a procedure for seeking post-conviction relief. Rule 37, A.R.Crim. P. (Repl. 1977).

FILED
MAR 16 1981
DONA L. WILLIAMS

This rule grants this Court jurisdiction over such matters. Further, this Court has specifically reserved jurisdiction over Rule 37 petitions as opposed to sending these petitions to the Arkansas Court of Appeals for consideration. Rule 29.1(e), Rules of the Supreme Court (Repl. 1980).

3. Petitioner must file with this Court a petition for permission to proceed to the trial court for an evidentiary hearing. Rule 37.2(a), A.R.Crim.P. (Repl, 1977). This petition must state grounds contained in Rules 37.1, A.R.Crim.P. (Repl. 1977). Failure to raise all grounds for available relief in the original, or amended, petition serves as a waiver of those grounds. Rule 37.2(b), A.R. Crim.P. (Repl. 1977). This petition must be filed within three years of the date of commitment unless the grounds for relief would render the judgment absolutely void. Rule 37.2(c), A.R.Crim.P. (Supp. 1979).

4. Petitioner is filing the required petition and is alleging grounds that he believes are a basis for remanding this matter to the trial court for an evidentiary hearing. Further, this petition is being filed within three years of the date of petitioner's commitment on October 26, 1978. Therefore, this petition is timely filed.

5. Petitioner notes that this Court has criticized counsel in the past for misconstruing the purpose or function of Rule 37, A.R.Crim.P. (Repl. 1977), and for raising as grounds for relief matters that this Court feel have no basis. *Hulsey v. State*, ___Ark.___, 595 S.W.2d 934 (March 31, 1980), *rehearing denied*, ___Ark.___, 599 S.W.2d 729 (June 9, 1980), *cert. denied*, ___U.S.___(October 20, 1980); *Neal v. State*, ___Ark.___, 605 S.W.2d 421 (September 29, 1980); *Collins v. State*, ___Ark.___, ___S.W.2d___(February

2, 1981). Petitioner agrees with this Court that judgments of conviction need to have a finality to them at some point. *Collins v. State, supra.* Petitioner also notes that should he be unsuccessful before this Court, it is incumbent upon his counsel to seek a writ of *habeas corpus* in federal court. Before the jurisdiction of the federal court on such a writ may be granted, however, petitioner must show that there has been an exhaustion of all available State remedies. 28 U.S.C. § 2254(b).

Since petitioner is represented by new counsel at this stage of the appellate proceedings, it is necessary that all available grounds for consideration be presented to this Court so there can be no question as to whether petitioner has exhausted his state remedies. Besides assuring that no waiver of petitioner's constitutional rights occurs, the procedure followed in this petition should accomodate the finality of a judgment in that it precludes the return to this Court on a particular point by the federal court for consideration as to exhaustion. If this Court misconstrues the intentions of counsel as to the procedure followed, counsel apologizes; however, counsel and petitioner affirmatively assert that this procedure is being followed in the best interests of petitioner. Further, petitioner affirmatively states that this petition is being filed in good faith and not for the purpose of delay and is an attempt to provide a logical, orderly progression through the various appellate remedies that may be available.

6. Petitioner notes that this petition may seem to be lengthy. In light of this Court's clarification as to the procedure to be followed, petitioner states all of his grounds for relief, with memoranda of law, in the petition.

Petitioner is not filing a separate statement of points and memorandum of law previously condemned by this Court. *Neal v. State*, *supra*, 605 S.W.2d at 423-424.

7. Petitioner's conviction and sentence should be vacated, and a new trial ordered, because he did not receive a fair trial before an impartial jury. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment were thereby violated. Further, petitoner's rights under Article II §§ 8, 10 of the Arkansas Constitution, and Ark.Stat.Ann. § 43-1919 (Repl. 1977), were also violated.

While this Court has passed on certain aspects of this question, other parts of the issue have not been reviewed. Because the Due Process Clause requires a higher degree of certainty in a death penalty case, *see*, *Gardner v. Florida*, 430 U.S. 349 (1977), and because of this Court's duty to review the record in a capital case for any error, whether argued on appeal on not, it is appropriate for this Court to now consider this point. Rule 36.24, A.R.Crim.P. (Repl. 1977).

The standard for reviewing this question were set forth by the United States Supreme Court in *Irvin v. Dowd*, 366 U.S. 717 (1961). The seating of a juror who has formed an opinion violates the Due Process guaranty of an impartial jury. The mere existence of opinion, without more, is insufficient to rebut a presumption of impartiality if the juror can lay aside that opinion. Review of the *voir dire* examination is a mixed question of law and fact. Where there is a pattern suggesting a settled opinion regarding guilt, a juror's protestation of impartiality should be given little weight.

In *Murphy v. Florida*, 421 U.S. 794 (1975), the Court confirmed the views expressed in *Irvin v. Dowd*, *supra*, noting that the totality of the circumstances of the case should be reviewed in determining whether a criminal defendant obtained trial by an impartial jury. The law in this State is in accord with those decisions. This Court has added that

> ...where the juror testifies that he is not one hundred percent sure that he can lay aside his previous impressions or opinions, we do not see how any discretion on the part of the court can add any assurance that the verdict will be rendered only upon the evidence presented in court. *Swindler v. State*, 264 Ark. at 113, 569 S.W.2d at 124 [Hereafter *Swindler I*].

The appeal of this cause dealt with the denial of mistrial and motion for change of venue with created by publicity problems. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979) [Hereafter *Swindler II*]. This analysis in the second case overlooked significant problems which, viewed in their totality, denied petitioner a fair trial.

A review of the totality of the circumstances reveals the following:

A. Jury selection at the second trial took five days. To select a panel of twelve jurors and one alternate, 126 venirepersons were examined. Of the 120 called before a panel was selected, 113 were asked if they had any knowledge about the case. 110 answered that yes they did have prior knowledge.

Of these, nine initially denied that they knew anything about the case. Some jurors had slight information. Others had closely followed the case up to, and through, *voir dire*.

B. The trial court, while often exercising great care in *voir dire*, made significant errors that require

this Court, in exercise of its supervisory powers, to vacate the judgment and order a new trial. Article VII § 4, ARK. CONST. *Cf., In re Rules of Criminal Procedure*, 259 Ark. 863, 530 S.W.2d 672 (1975); *Murphy v. Florida, supra.*

The trial court was extremely inconsistent in determining whether a particular venireperson's protestations of impartiality were acceptable. Every juror who acknowledged familiarity with the petitioner or the case gave this information without prompting. This Court's attention is drawn, for illustrative purposes, to the following:

1. Venireperson Oakes, when asked what he knew about the case, gave answers regarding petitioner's background, prior trial and reversal. [R. 755].

2. Venireperson Sunderman answered questions with similar information. [R. 971-980].

3. Venireperson Crase, after initially trying to deny any knowledge about the case, revealed that he had information regarding petitioner's capture and prior background [R. 999-1004].

4. Venireperson Jones, indicated knowledge of the events prior to and after the first trial, and indicated that he knew of anticipated defenses from reading about the case the day before his *voir dire* [R. 1153-1163].

5. Venireperson Bricksey, knew of petitioner's background, other charges petitioner was facing, the first trial petitioner received, and that he would have difficulty putting this information aside [R. 1295-1319].

6. Venireperson Holland, after initially denying any knowledge, stated that he knew about the case from recent news on television. [R. 1355]

7. Venireperson Blythe, noted that everyone knew about the crime [R. 1392-1395].

8. Venireperson Montgomery, knew about the prior trial and had been listening to newscasts about the pending trial [R. 1451-1469].

9. Venireperson Wilson had read about the case and heard a potential juror discussing the case [R. 1490, 1497-1498].

This is not, by any means, a complete list of the type of information that the venirepersons gave about their prior knowledge of this case. This situation should be contrasted with that in *Murphy v. Florida*, *supra*, where defense counsel brought much of the information before the panel by asking leading questions on *voir dire*. 421 U.S. at 800-801, *nn.* 3,4,5.

Despite the familiarity of potential jurors with the facts of the case, and the large number that were convinced prior to trial of petitioner's guilt, the trial court did little to abate the situation.

Voir dire took five days. [R. 684-1241]. The trial court *never* admonished jurors or potential jurors not to read about the case or listen to radio or television newscasts. This admonition was never given despite the fact that potential jurors acknowledged that they were obtaining new and recent information. *See, e.g., Venireperson Neal* [R. 808].

On the second day of jury selection, four venirepersons noted that they had heard recent information. [R. 908; 961; 1042-1045; 1051].

On the third day of jury selection, six persons advised that they had recent information. [R. 1120; 1139; 1153;

1170; 1187; 1204]. One of these venirepersons, Thurman Jones, acknowledged reading a complete account of the case while awaiting *voir dire*.

On the fourth day of jury selection, six persons acknowledged having read or heard recent news accounts about the case. [R. 1253; 1261; 1286; 1329; 1362; 1380].

By the fifth day of jury selection, seven persons acknowledged having read or heard recent news accounts. [R. 1413; 1432; 1435; 1443; 1448; 1451; 1470]. Three of the six persons interviewed as alternates had read or heard recent news accounts. [R. 1490; 1511; 1518].

Despite these repeated indications that jurors were receiving, and were interested in receiving, information about the case from sources outside the courtroom, the trial court did not admonish them to not read news accounts. He did "suggest" to the first two jurors seated that they not read or listen to accounts of the trial. [R. 969; 986]. The trial court did not make this suggestion to the other persons that were selected as jurors or alternates.

Admonitions that the trial court gave were clearly violated, but still the trial court took no action. Only the bare requirements of Ark.Stat.Ann. § 43-2122 (Repl. 1977), were met. Despite indications that this was insufficient, the trial court did nothing further.

On the first day of *voir dire* the trial court instructed the jurors not to discuss the case among themselves or to let it be discussed in their presence. Some potential jurors violated this instruction.

1. Venireperson Pica mentioned having heard gossip in the hall--apparently referring to persons await examination [R. 1195].

2. Venireperson Hunt stated that something was said to him while he was awaiting examination [R. 1214].

3. Venireperson Wilson, who was questioned on the fifth day, stated that she heard an opinion expressed by another potential juror [R. 1498].

These comments were being made in front of the trial court the last three days of jury selection. Potential jurors were clearly not obeying the trial court's instructions. The record reflects that the trial court made no effort to determine the source of these varied comments, who had heard them, or who had made them. As a minimum, those selected as jurors should have been questioned. *See, Mosely v. State*, 258 Ark. 485, 527 S.W.2d 616 (1973); *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977); *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

It is clear that the record does not reflect a single instance of any juror, or potential juror, voluntarily notifying the trial court of these comments. It is also clear than an approach to a juror may have necessitated a mistrial. Here the lack of inquiry by the trial court is fatal to the State's claim that petitioner received a fair trial.

This entire situation draws into question the finding that the jury was impartial. It is a critical question where, as here, a defendant's life is at stake. *Irvin v. Dowd, supra.*

The totality of the circumstances of this jury selection require this Court to set aside this conviction and sentence and return this case for a new trial. Speculation that jurors were not tainted is insufficient where there were clear violations of the trial court's partial admonitions, where the admonitions were insufficient in light of the information available to the trial court, and where no action

was taken by the trial court, of petitioner's trial counsel, to explore or minimize the violations of the trial court's instructions.

C. Petitioner did not receive effective assistance of counsel as to obtaining a fair trial by an impartial jury. Because of this ineffectiveness, the judgment should be vacated and a new trial ordered. In the alternative, without waiving the above request, permission should be granted to proceed to the trial court for a hearing to determine whether counsel was effective in his attempts to obtain an impartial jury.

The specific reasons petitioner raises to support these grounds are:

1. Trial counsel failed to obtain affidavits or make a record regarding adverse, pervasive, prejudicial pretrial publicity to support a second change of venue pursuant to Ark.Stat.Ann. § 43-1502 (Repl. 1977).

2. Trial counsel failed to peremptorily challenge certain jurors. Specifically, these jurors are: Henry Sunderman [R. 985]; Thurman Jones [R. 1164]; Milton Skaggs [R. 1241].

3. Trial counsel failed to question the previously mentioned jurors with respect to whether they were one hundred percent sure that they could set aside prior knowledge and opinions about the case. This answer to this question would have supported petitioner's challenge of these jurors for cuase. *Swindler I.*

4. Trial counsel failed to request an admonition from the trial court to potential jurors to not read or listen to news accounts regarding the case both during jury examination, and after selection for jury service.

5. Trial counsel failed to request an investigation into the nature of opinions being expressed among potential jurors and whether those selected had been infected by these opinions. Since potential jurors were violating the trial court's partial admonition to not discuss the case, there is no reason to believe that jurors protestations that they could, or would, set aside prior opinions were true.

6. Trial counsel failed to move that petitioner be granted additional peremptory challenges because of the widespread prior knowledge of the case expressed by potential jurors. *See, Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976).

These failures by trial counsel cannot be characterized as mere omissions or mistakes in strategy. The record reflects a misunderstanding of the law on venue by counsel to the extent that not even basic procedures were followed in order to effect a second change of venue. [R. 751; 876; 1071-1074; 1243-1245; 1405-1409; 1528-1559]. Or, as this Court succintly stated

> While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' *voir dire* examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity of ill feelings in the community as a result of the killing, was offered, as they had been in [*Swindler I*] or *Ruiz & Van Denton v. State*, *supra*.
>
> Our law provides affidavits or sworn testimony must be offered to support a motion for change of venue. Ark.Stat.Ann. § 43-1502. *Swindler II*, 267 Ark. at 424; 592 S.W.2d at 94 [Clarification added].

8. Petitioner was denied trial by a jury selected from a cross section of the community, and inadequate assistance of counsel because the jury was qualified to render a death penalty. Trial counsel was inadequate in that it

failed to request a hearing, or to put on evidence that juries qualified to render a death penalty were prosecution prone, and did not represent a fair cross section of the community. *See, Grigsby v. Mabry*, 483 F.Supp. 1372 (E.D.Ark. 1980, *aff'd as modified*, ___F.2d___(8th Cir. 1981).

9. Petitioner states a a ground for relief that he was denied effective assistance of counsel at the penalty phase of the second trial. Specifically, petitioner states that trial counsel was ineffective in failing to object to the introduction of a prior conviction for armed robbery on the basis that the judgment of conviction does not clearly show that petitioner was represented by counsel. Further, trial counsel was ineffective in failing to use due diligence to investigate and prepare for presentation to the jury evidence as to mitigating circumstances. Petitioner states that this evidence would have been readily available if trial counsel had merely asked petitioner for this information, or had properly investigated information provided petitioner by the State through discovery.

In making this argument, petitioner first notes that the United States Supreme Court has recognized that the penalty phase of a capital case is to be judged on equal footing as the guilt phase in determining if Due Process rights of the defendant have been protected.

> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

The right to counsel, in a state prosecution, is a Due Process right. The Sixth Amendment right to counsel has been applied to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v.*

Alabama, 287 U.S. 45 (1932). Therefore, this right to counsel attaches to the penalty phase of a capital case.

To sustain an allegation of ineffective assistance of counsel at the penalty phase of the trial, petitioner must demonstrate that counsel was ineffective. *McDonald v. State*, 257 Ark. 879, 520 S.W.2d 292 (1975). The showing must be more than an allegation that because of errors, omissions, or improvident strategy, counsel was ineffective. *Clark v. State*, 255 Ark. 13, 498 S.W.2d 657 (1973).

If the allegation of ineffective counsel is couched solely in terms of matters of judgment, then a hearing on the issue is not required. *Leasure v. State*, 254 Ark. 961, 497 S.W.2d 1 (1973). Further, a hearing is not required if petitioner has had an adequate opportunity to raise the issue in the trial court, or on direct appeal. *Hilliard v. State*, 259 Ark. 81, 531 S.W.2d 463 (1976). If, however, a hearing is ordered on this issue, petitioner must show by clear and convincing evidence that trial counsel was so patently lacking in competence at the penalty phase that it became the duty of the trial court to be aware of this incompetence and to correct it. *Collins v. State*, ___Ark.___, ___S.W.2d___(February 2, 1981).

Petitioner accepts the burden that he must show at a hearing that trial counsel was ineffective at the penalty phase. This issue could not have been raised on direct appeal since trial counsel prepared petitioner's direct appeal. The request for a hearing is in accordance with this Court's direction

> If the accused did not have adequate opportunity to raise the question in the trial court before appeal, he can raise the question by motion for post conviction relief. *Hilliard v. State*, *supra*, 259 Ark. at 84, 497 S.W.2d at 2.

Petitioner is requesting the opportunity that this Court has requested--i.e, to present to the trial court the allegations that trial counsel was ineffective at the penalty phase of the trial.

A. The first argument is that trial counsel failed to properly object to the entry into evidence at the penalty phase of a prior judgment of conviction. The judgment of conviction was for the offense of armed robbery as an accessory before or after the fact. [R. 2188] The judgment does not make clear on its face that petitioner was represented by counsel at trial or plea on this charge.

Dealing with the habitual offender trials, this Court has held that if the judgment of conviction does not make clear that the defendant was represented by competent counsel, there is a presumption that the defendant was not represented and the conviction cannot be introduced into evidence. The jury is not allowed, in that situation, to use the conviction for its consideration of increased penalties. *Reeves v. Mabry*, 480 F.Supp. 529 (E.D.Ark. 1979); *Wilburn v. State*, 253 Ark. 608, 487 S.W.2d 600 (1972); *Klimas v. State*, 259 Ark. 301, 534 S.W.2d 202 (1976). Petitioner contends that this standard should also apply to the penalty phase of a capital case. This assertion is particularly true since this judgment was the only competent evidence that could show beyond a reasonable doubt that petitioner had, at the time of the capital murder, previously committed a felony, an element of which was the use, or threatened use, of force or violence. Ark.Stat.Ann. § 41-1303(3) (Crim.Code 1976). [R. 2204]

There are some names that appear on the judgment of conviction that might be that of defense counsel. However,

PAGE 15 IS "MISSING IN ORIGINAL"

of his that could have been used as mitigating evidence. Petitioner's present counsel have been in contact with members of petitioner's family and have learned of evidence that related to petitioner's mental condition, his prior work record when not in the penitentiary, and his ties to his family. This information was gleaned merely from asking petitioner about family members and making telephone calls to those family members.

2. The fact that a psychiatrist had examined petitioner prior to the first trial and found him to be hysterical with evidence of paranoid delusions of grandeur and persecution. [R. 13] While this evidence may not have been sufficient to warrant an acquittal by reason of mental disease or defect, it should have led to further investigation to show the applicability of the mitigating circumstances listed in Ark.Stat.Ann. §§ 41-1304(1)(2)(3)(Crim.Code 1976). In further investigation of this matter, present counsel have learned that determinations by the Arkansas State Hospital primarily concern whether a defendant suffers from a psychosis that is so severe as to render him incompetent to stand trial. The information, from Dan Donahue, Ph.D., a clinical psychologist at the Arkansas State Hospital, was learned merely by making a telephone call. Dr. Donahue further stated that in making its determination, the staff does not even consider the possibility that this evidence may be used to show mitigation during the penalty phase of a capital trial. When questioned further about this report concerning petitioner, Dr. Donahue indicated that a follow up investigation could have provided information that would make applicable the mitigating circumstances listed above.

3. The fact that petitioner was not used as a witness again during the penalty phase of the trial. This failure is particularly relevant in light of the prosecuting attorney's closing argument that petitioner had not shown any remorse at the fact a human life had been taken, regardless of the claim of justification. [R. 2141].

4. The fact that a correspondent of petitioner's--Mrs. Francis Nixon--had gleaned insight into petitioner's character during their communications between the first and second trials in this matter. This information could have been used in mitigation to show personality traits and petitioner that would justify the jury allowing him to escape the death penalty. This information was learned merely by asking petitioner and making a telephone call to Mrs. Nixon.

Petitioner contends that these matters were never discussed with him by counsel in the preparation for the trial of this matter. In short, except for the proposed testimony of Mr. Don Reid, there was no preparation for this phase of the trial. Of course, petitioner again asserts that the failure of the trial court to permit a brief continuance so Mr. Reid could appear to give information about rehabilitation about death row prisoners was error. This assertion is particularly true in light of the fact that Mr. Reid could have evidently been present had the trial not been previously delayed so a juror could attend a funeral. It is noted that this delay occurred despite the fact that alternate jurors had been chosen which could have prevented the delay.

It has been noted that it is debatable whether to call the defendant in a capital case as a witness during the

penalty phase of a capital case after he has served as a witness during the guilt phase. *Voyles v. Watkins*, 489 F.Supp. 901 (N.D.Miss. 1980). However, it was further noted in that case that the presentation of the kind of evidence petitioner outlined above would have supported the trial court's instructions as to mitigation.

> The lack of any mitigating evidence resulted from the failure of defense counsel to exercise diligence in locating and presenting witnesses who were in position to establish traits of good character. *Voyles v. Watkins*, *supra*, 489 F.Supp. at 909.

Of course, as has been noted by the United States Supreme Court, evidence as to character traits is certainly admissible during the penalty phase of a capital case. *Lockett v. Ohio*, 438 U.S. 586 (1978). This mandate is consistent with the language of Arkansas' statute concerning mitigating circumstances. Ark.Stat.Ann. § 41-1304(Crim.Code 1976).

Petitioner admits that he has had to go outside the record to present the above listed evidence for consideration by this Court. This is evidently the procedure approved by this Court for Rule 37 petitions. *Neal v. State*, *supra*. Indeed, the failure of counsel to go outside the record is evidently a basis for denying a petition to proceed to the trial court for an evidentiary hearing on the issue. *Collins v. State*, *supra*.

The failure of trial counsel to investigate and present this evidence, or to properly object to the admission of extremely damaging and inadmissible evidence, indicates that the penalty phase of this trial was rendered a farce and a mockery of justice. However, this is not the issue for this Court to determine at this stage. It is an issue for the trial court to determine. *Hilliard v. State*, *supra*.

Therefore, petitioner respectfully requests permission to proceed to the trial court for an evidentiary hearing on this issue of ineffective assistance of counsel at the penalty phase.

WHEREFORE, premises considered, petitioner prays that this Court: (1) enter a stay of execution forthwith until this petition can be considered on the merits; (2) that upon consideration of the petition, this Court vacate the judgment and sentence and remand this matter for a new trial; (3) that in the alternative, without waiving the above requests, that this Court remand this matter to the Sebastion Circuit Court, sitting on change of venue in the Scott Circuit Court, for an evidentiary hearing on the allegations contained herein.

Respectfully submitted,

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and

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By: Charles L Carpenter Jr

By: Thomas M. Carpenter

COUNSEL FOR PETITIONER, Pro Bono Publico

STATE OF ARKANSAS)
COUNTY OF PULASKI)

We, counsel for petitioner herein, do hereby certify that the above information is true and correct to the best of our knowledge and belief, and that this petition is being filed in good faith and not for the purpose of delay.

Charles L Carpenter Jr Thomas M. Carpenter

Subscribed and sworn to before me this 16th day of March, 1981.

Josie Lester
NOTARY PUBLIC

My commission expires:

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, one of counsel for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition has been served on opposing counsel this 16th day of March, 1981, by hand delivering a copy of same to the Honorable Steve Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas.

Thomas M. Carpenter

A P P E N D I X

Day 1 - Oct. 16, 1978 Day 2 - Oct. 17, 1978 Day 3 - Oct. 18, 1978
Day 4 - Oct. 19, 1978 Day 5 - Oct. 20, 1978

JURORS WHO INITTALLY DENIED KNOWLEDGE - 9

1. Robert Oliver T. 955, 961
2. Shirley Limbocker T. 1014, 1019
3. Walter Goddard T. 1254, 1261
4. Oscar Stringer T. 1321, 1322
5. L. D. Casey T. 1324, 1324
6. J. E. Holland T. 1355, 1355
7. Farris Blythe T. 1387, 1392
8. Cora Owens T. 1413, 1422
9. Mickey Austin T. 1431, 1431

JURORS WHO HAD RECENT KNOWLEDGE - 27

1. James Neal, T. 808, Day 1
2. Sharon K. Self, T. 908, Day2
3. Robert Oliver, T. 961, Day2
4. Carolyn Gilbert, T. 1042,1045, Day 2
5. Earl Overton, T. 1051, Day 2
6. Billy Pat Franklin, T. 1120, Day 3
7. Richard Moore, T. 1139, Day 3
8. Thurman Jones, T. 1153, Day3
9. William Hartsill, T. 1170, Day 3
10. Lenora Pica, T. 1187, Day 3
11. Bobby Hunt, T. 1204, Day 3
12. Glen Dale Tull, T. 1253, Day 4
13. Walter Goddard, T. 1261, Day4
14. T. G. Wagner, T. 1286, Day
15. L. D. Casey, T. 1329, Day 4
16. J.E. Holland, T. 1362, Day 4
17. John Robinson, T.1380, Day 4
18. Cora Owens, T.1413, Day 5
19. Jerry Carter, T. 1432, Day 5
20. L. Stokes, T. 1435, Day 5
21. J. Page, T. 1443, Day 5
22. K. Cottingham, T. 1448, Day
23. J. Montgomery,T.1451,Day 5
24. K. Edmonson,T.1470,Day 5
25. M. Wilson, T.1490, Day 5
26. E. Deadman, T.1511, Day 5
27. H.Robinson, T. 1518, Day5

SUPREME COURT OF ARKANSAS

No. CR 79-116

Opinion Delivered 4/20/81

JOHN EDWARD SWINDLER,

Petitioner

v.

STATE OF ARKANSAS,

Respondent

PETITION TO PROCEED UNDER RULE 37

Petition Denied.

PER CURIAM

Petitioner, John Edward Swindler, brings this petition seeking post-conviction relief under Rule 37, A. R. Crim. P. (Repl. 1977) from his conviction for capital murder, Ark. Stat. Ann., § 41-1501 (Repl. 1977). He was sentenced to death by electrocution in that conviction, the date for execution being originally set for March 21, 1981. On March 13, 1981, petitioner sought a stay of execution, and on March 16, 1981, filed this petition for post-conviction relief under Rule 37. On March 18, 1981, we granted the stay of execution in order that we might properly consider the present petition to proceed under Rule 37. The petition has been considered and is now denied, and we dissolve the stay of execution granted in the order of March 18, 1981.

We see no need to repeat the facts of this case, as they are fully stated in two previous decisions of this court. We will briefly summarize the proceedings up to the filing of this petition. John Edward Swindler was originally tried and convicted of capital murder in the 1977 death of Officer Randy Basnett of the Fort Smith Police Department. That conviction was appealed, however, and this court was compelled to reverse the conviction on the grounds that the trial court erred in failing to grant a motion for change of venue, and in empanelin three of the jurors in that case. Swindler v. State, 264 Ark. 107, 569

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S.W.2d 120 (1978). Following that remand, the petitioner was again tried, in a different court, and again convicted and sentenced to death. On direct appeal from this second conviction, we affirmed the trial court in an opinion more thoroughly discussed hereafter. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. den., ___U.S.___, 101 S.Ct. 630, 66 L.Ed. 511 (1980).

Rule 37.1 provides:

> A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
>
> (a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
>
> (b) that the Court imposing the sentence was without jurisdiction to do so; or
>
> (c) that the sentence was in excess of the maximum authorized by law; or
>
> (d) that the sentence is otherwise subject to collateral attack; may file a verified motion at any time in the court which imposed the sentence, praying that the sentence be vacated or corrected.

Rule 37.2 makes clear that if the petitioner has previously brought a direct appeal of his conviction to the Supreme Court then no proceeding may be brought in the trial court without prior consent of this court, as the present petition seeks. In applying Rule 37, we have made clear as in Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (Opinion delivered March 31, 1980):

> This postconviction remedy was not intended to provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. Hulsey, at 313.

Even questions of consitutional dimension are not preserved beyond the direct appeal of the conviction unless they are shown to be of such fundamental nature that the judgment is rendered void.

> All these questions, and doubtless scores of others, might have been raised at the trial and thereafter on the first appeal, but they were not. Although they are argued as constitutional questions, they do not raise issues so fundamental as to render the sentence and the judgment void and open to collateral attack. Such constitutional questions are waived if not raised in accordance with the controlling rules of procedure. [Citations omitted.] In this court, contentions not argued by the appellant - in this instance on the first appeal - are waived. Hulsey, at 315.

See also, Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981) and Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979).

In the petition for post-conviction relief under Rule 37, the petitioner argues: 1) that he was denied a fair trial by a fair and impartial jury; specifically a) the court erred in seating certain persons who allegedly had formed opinions in the case; b) the trial judge failed to admonish the jury concerning publicity surrounding the trial; and c) that there should have been a change of venue; and 2) that he did not receive effective counsel; specifically a) counsel failed to make certain objections at voir dire and b) failed to present certain testimony of mitigating circumstances at the sentencing phase of trial.

First, we note that in our decision on the direct appeal, Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), the allegations of the change of venue request, the voir dire examination, and the seating of the jury were all reviewed. Therefore, we will not consider the petitioner's argument for relief based on issues arising out of those proceedings.

> It (Rule 37) is not intended to permit the petitioner to again present questions which were passed upon direct appeal. Hulsey v. State, supra. Nor does it permit a petitioner to raise questions which might have been raised at the trial or on the record on direct appeal....

Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980), at 447. What is left, then, of the petitioner's request is the broad allegation of ineffectiveness of counsel at the sentencing phase of the trial. The allegation of ineffectiveness of counsel at the sentencing phase of the trial is based on the alleged failure of trial counsel to call

certain witnesses and to develop certain testimony as to mitigating circumstances. However, as we pointed out in Leasure v. State, 254 Ark. 961, 497 S.W.2d 1 (1973):

> The calling of witnesses in a criminal trial is a matter which is normally within the realm of judgment of counsel. At 968.

We remain unconvinced from the bare allegations of the present petition as to what might, or conceivably could have been used in the sentencing phase, that defense counsel was ineffective. Any error of omission by counsel was not of such grave nature "as to render the judgment void and open to collateral attack." Neal, at 447.

We do not find any merit in the petitioner's request to proceed under Rule 37 under the requirements set for such proceedings in our decisions of Neal, Hulsey, Rogers and Collins, above. Petitioner's petition to proceed under Rule 37 will therefore be denied. Our order of March 18, 1981, granting petitioner a stay of execution is dissolved, petitioner having exhausted all remedies recognized by this state.

Petition denied.